U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 10, 2006

The Honorable Richard G. Lugar
Chairman
Committee on Foreign Relations
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to the second set of questions arising from the November 15, 2005, appearance before the Committee of Samuel Witten, Deputy Legal Adviser within the Department of State, and Mary Ellen Warlow, Director of the Office International Affairs within the Criminal Division of the Department of Justice. The subject of the Committee's hearing was extradition and mutual legal assistance treaties. This set of questions relates to the proposed United States-United Kingdon extradition treaty. It includes your question 8 and Senator Biden's questions 1-20.

We hope that this information is helpful to you. Please feel free to call upon us if we may be of additional assistance in connection with this or any other matter.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

Committee on Foreign Relations
United States Senate

Question for the Record
For

Samuel Witten
Department of State

and

Mary Ellen Warlow
Department of Justice

Concerning
Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland
(Treaty No. 108-23)
November 15, 2005

Question 8 from Senator Lugar

Question 8: Article 4(2) of the treaty contains a list of violent crimes to be excluded from consideration as political offenses. This list differs somewhat from the existing list of such offenses contained in the 1985 Supplementary Treaty. Please explain the differences between the two lists and the reasons these changes were made.

Answer:

As in other extradition treaties, the new treaty provides that certain types of offenses will not be considered to be political offenses for the purpose of evaluating a request for extradition. Many of these provisions, including (a), (c), (d), (e), and (g), are similar to provisions contained in the existing treaty.

The addition of section (b) ("a murder or other violent crime against the person of a Head of State of one of the Parties, or of a member of the Head of State's family") has become a routine provision under the political offense exception, in recognition of the inherent seriousness of attacks against heads of state.

The addition of section (f) ("possession of an explosive, incendiary, or destructive device capable of endangering life, of causing grievous bodily harm or of causing substantial property damage"), which is not contained in any other extradition treaty of the United States, is designed to address the problem of an extremely narrow U.S.

judicial interpretation of the more general language of the current UK supplementary treaty regarding explosives offenses. In the extradition case involving Pol Brennan, the United Kingdom sought the extradition of Brennan, who was arrested with a companion in downtown Belfast on the early afternoon of a business day in possession of an armed 23-pound bomb, which they intended to plant in a shop. Brennan was subsequently convicted of the offense of possession of explosives with intent to endanger life or injure property, escaped from prison, and was subsequently arrested in the United States. (*Matter of Artt*, 972 F.Supp. 1253, 1260-1262 (N.D.Cal. 1997).) In the course of the U.S. extradition case against Brennan, the Court of Appeals for the Ninth Circuit held that this offense did not constitute an "offense involving the use of a bomb" excluded from consideration as a protected political offense under Article 1(d) of the Supplementary Treaty. *Matter of Artt*, 158 F.3d 462, 471-473 (9th Cir. 1998). The language of the new treaty makes it clear that such an explosives offense, like other serious crimes of violence, is not to be considered a "political" offense for which extradition is barred.

The use of "manslaughter" in section (c) of the new treaty, as opposed to "voluntary manslaughter" in the 1985 Supplementary Treaty, is consistent with the language used in other recent U.S. extradition treaties, including Canada, Hungary, Luxembourg, and Poland. The use of "any form of unlawful detention" in section (d) instead of "serious unlawful detention," reflects the language used in other extradition treaties, including those with Canada, France, and Hungary. The use of "an offense involving" certain acts, in section (d), is not unique to the new treaty – it is used in Article 1(d) of the 1985 Supplementary treaty. This same language is also used in other of our modern U.S. extradition treaties, including those with France, Hungary, and Poland.

The changes to the wording in section (e) ("placing or using, or threatening the placement or use of, an explosive, incendiary, or destructive device or firearm capable of endangering life, causing grievous bodily harm, or of causing substantial property damage") derive from our decision to have this language track the analogous international commitment in the United Nations International Convention for the Suppression of Terrorist Bombings, an international law enforcement cooperation agreement to which both the United States and the United Kingdom are parties. Section (e) also includes unlawful use of firearms, which, of course, was beyond the scope of the U.N. Convention and, in this respect, is similar to the analogous provision in Article 1(d) of the existing treaty.

The changes to the wording in section (g) ("an attempt or a conspiracy to commit, participation in the commission of, aiding or abetting, counseling or procuring the commission of, or being an accessory before or after the fact to any of the foregoing offenses") closely reflect the wording of U.S. criminal law on principals and aiding and abetting, which states, in part, that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2.

Questions 1-20 from Senator Biden

Question 1: Are there any diplomatic notes or negotiating statements relative to the meaning of treaty terms about which the Committee has not been informed?

Answer: No.

Question 2: Has the Executive Branch prepared a technical analysis of the treaty, as was done in connection with consideration of extradition treaties in the 105th, 106th, and 107th Congresses (no such treaties were considered in the 108th Congress)? If so, please provide it. If not, why was such analysis not prepared?

Answer:

No technical analysis of the treaty was prepared. For a number of years, the executive branch drafted technical analyses for bilateral law enforcement treaties, motivated largely by the need to explain mutual legal assistance treaties (which at the time were new and innovative types of law enforcement instruments) to U.S. prosecutors and the public. After more experience and upon further consideration, the executive branch determined that these analyses, which are not typically prepared for other treaties, were no longer needed. Moreover, the content of such technical analyses of law enforcement treaties had become largely duplicative of the section-by-section analysis provided in the Secretary of State's Report (provided to the Foreign Relations Committee as part of the President's transmittal package) on each treaty.

Question 3: On August 3, 2004, the Department of State issued a "Fact Sheet" on the treaty. Does it provide an authoritative representation of the views of the Executive Branch regarding the treaty terms that are addressed by the fact sheet?

Answer:

The Fact Sheet was prepared in an effort to address, in plain language, questions that had been posed about aspects of the proposed new U.S.-UK extradition treaty. It is meant to serve as a general guide to the new treaty, but the Administration's definitive view of relevant issues is provided in the transmittal documents given to the Foreign Relations Committee and in the Administration's November 15, 2005 testimony.

Question 4: Please provide data on the following:

a. The number of extradition requests made by each party under the current U.S.-U.K. extradition treaty in the last five years (on either a calendar year or fiscal

year basis), and information on the number of such requests that were (1) approved, (2) not approved, or (3) withdrawn.

b. Of all requests filed by the United States to the United Kingdom since January 1, 2003, provide a general summary of the types of cases (e.g., numbers of cases involving terrorist offenses, number of cases involving violent crimes, number of cases involving narcotics charges, number of cases involving fraud offenses).

Answer:

a. Approximate number of U.S. extradition requests to the United Kingdom during calendar years 2001 through 2005: 116. Of these, approximately 20 were approved, 2 were not approved, 10 were withdrawn, and approximately 36 are currently being litigated in UK courts. (Others had dispositions such as: the fugitive died prior to disposition; the fugitive waived extradition proceedings; the fugitive was subsequently arrested in the United States; the fugitive was subsequently located in a third country; the fugitive could not be located; or the fugitive has been found extraditable and is in custody in the United Kingdom but cannot be surrendered until he has served his UK sentence.)

   Approximate number of UK extradition requests to the United States during calendar years 2001 through 2005: 33. Of these, approximately 7 were approved, 2 were not approved, 2 were withdrawn, and approximately 4 are pending but not yet the subject of judicial proceedings in the United States. (Others had dispositions such as: the fugitive was deported; the fugitive waived extradition proceedings; the fugitive was subsequently located in a third country; the fugitive could not be located; or the fugitive has been found extraditable and is in custody in the United States but cannot be surrendered until he has served his U.S. sentence.)

b. A general breakdown of the U.S. extradition requests made to the United Kingdom between January 1, 2003, and the present, by types of crimes together with their approximate numbers, is as follows:

   Fraud and other white collar crimes (including money laundering, forgery and counterfeiting, and tax offenses): 22

   Terrorism (including supporting terrorist activities and weapons of mass destruction): 8

   Narcotics offenses: 14

Violent crimes (including homicide, attempted homicide, assault, robbery, burglary, and weapons/firearms offenses): 12

Kidnapping (including parental abduction): 2

Sexual offenses (including child molestation/rape and child pornography): 10

Question 5: The proposed treaty excludes Article 3 of the 1985 Supplementary Treaty, which provided that extradition would not occur if the fugitive established before a U.S. court, by a preponderance of the evidence, that the request for extradition was made on account of his race, religion, nationality, or political opinion, or that he would be prejudiced at trial by reason of his race, religion, nationality, or political opinion. By its terms, this provision from the 1985 Supplementary Treaty is broader than the political motivation provision barring extradition under Article 4(3) of the proposed treaty.

a. What was the rationale for eliminating the provisions of Article 3 of the Supplementary Treaty?

b. Please describe all instances where a fugitive sought judicial review under Article 3 of the 1985 Supplementary Treaty and extradition was denied on a basis set forth in that article.

Answer:

In U.S. law and practice, the question of "political motivation" and questions regarding motivation based on similarly improper bases such as race or religion, are determined by the Secretary of State. This responsibility of the Secretary of State has been recognized by U.S. courts in the longstanding "Rule of Non-Inquiry," whereby courts defer to the Secretary in evaluating the motivation of the foreign government. This principle recognizes that among the three branches of the U.S. Government, the Executive branch is best equipped to evaluate the motivation of a foreign government in seeking the extradition of an individual. The U.S. Government's extradition treaties reflect the fact that the U.S. Secretary of State appropriately makes this judgment, and not the U.S. courts.

Indeed, until 1985, the issue of motivation of the Government of the United Kingdom in making an extradition request of the United States was treated the same as in all of our other extradition relationships – the courts played no role in reviewing this issue. In 1985, however, as part of an amendment of other aspects of the UK extradition relationship, the U.S. Senate developed what became Art. 3(a) of the 1972 U.S.-UK extradition treaty, as amended by the 1985 supplementary treaty, which states that extradition "shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for

extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions." This text was added pursuant to the Senate's Resolution regarding advice and consent to the 1985 supplementary treaty.

This anomalous treaty provision has led to long, difficult, and inconclusive litigation in several cases, where U.S. courts were thrust into the unfamiliar and inappropriate position of addressing motivation of a foreign government. The provision for judicial review of political motivation claims has been invoked in five cases, all dating from the early 1990s. The first involved Curtis Andrew Howard, who claimed he would be prejudiced in legal proceedings in the United Kingdom because of his race. He was extradited in 1993. The other four of these cases involved persons of Irish Catholic background who were convicted of crimes of violence in Northern Ireland, and who escaped from prison in Northern Ireland in 1983 and fled to the United States.

The first of these cases involved James Joseph Smyth, who had been convicted of the attempted murder of a prison guard. More than 40 witnesses were heard at his extradition hearing, and a 5-week evidentiary hearing was held. (Ultimately, the record in the case exceeded 3,000 pages.) In 1996, Smyth was finally extradited from the United States to the United Kingdom. He was subsequently released from prison in 1998 pursuant to an accelerated release law, the Northern Ireland (Sentences) Act 1998, that grew out of the Belfast Agreement. The next three cases involved defendants Kevin John Artt, Terence Damien Kirby, and Pol Brennan, who were arrested separately in the United States between 1992 and 1994. Their extradition cases were consolidated for consideration by U.S. courts. All had been convicted in the UK judicial system of felonies and sentenced to terms of imprisonment. Artt was convicted of murdering a prison official; Kirby was convicted of offenses of possession of explosives and a submachine gun, false imprisonment, assault, and felony murder arising out of two separate incidents; Brennan was convicted of possession of explosives. There was extensive litigation and testimony in the U.S. District Court regarding their claims of prejudice under Article 3 of the 1985 supplementary treaty and numerous appeals. This litigation was and is unprecedented, as U.S. courts were put in the position of evaluating defendants' claims of generalized, systemic bias within a foreign system of justice. In 2000, the United Kingdom withdrew its request for extradition, consistent with its announcement that it would not be seeking the extradition of persons who, if they had remained in prison in Northern Ireland, would have benefited from the 1998 early release law.

Question 6: Article 4(3) of the proposed treaty provides that extradition shall not be granted if the competent authority of the Requested State determines that the request was politically motivated. Please describe the process of review in the Executive Branch when a person whose extradition has been certified by a court under 18 U.S.C. § 3184 makes such a claim. In the last five calendar years, how often has the Secretary of State denied extradition under similar provisions in other bilateral extradition treaties?

Answer:

Consideration of whether a request for extradition is politically motivated begins when it is received by the Department of State. We have found that requests which the Department of State believes may be politically motivated are generally also insufficient as a technical matter, for example, the facts and evidence provided by the Requesting State do not meet the probable cause standard, the proper documentation has not been provided, the papers have not been appropriately certified, or the dual criminality requirement is not met. This circumstance is not surprising given that these types of requirements in extradition treaties are designed, in part, to ensure a robust level of integrity in the extradition process.

If, at any time in the extradition process prior to the signing of the surrender warrant by the Secretary of State (or other appropriate principal of the Department of State), the U.S. Executive Branch becomes aware of facts or circumstances that suggest a request might be politically motivated, the Department of State explores that possibility through the diplomatic channel and otherwise until fully satisfied that the request is not politically motivated.

After a fugitive has been found extraditable and committed to the custody of the U.S. Marshal, and all appeals in U.S. courts have been exhausted, the Department of State reviews the record of the case as certified by the District Court to the Secretary of State. This record normally consists of the Magistrate's Certification of Extraditability and Order of Commitment, any related orders or memoranda issued by the Magistrate, all court orders issued in the course of any appellate proceedings, the transcript of the extradition proceedings before the Magistrate, and the documents submitted by the requesting State. In addition, it is the Department of State's policy to accept and review written argumentation against extradition submitted by the fugitive or his counsel if received in time to be included with the Department's final review of the case. Also, members of the fugitive's family or other interested parties may make written representations (these are usually of a humanitarian nature) on behalf of the fugitive. All of these things are taken into consideration by the Department of State with a view to determining what recommendation to make to the Secretary of State with respect to a possible extradition.

In the last five calendar years, the Secretary of State has not denied extradition on the basis that the request was politically motivated. As noted above, some requests are not processed through the U.S. court system because they are based on summary assertions of culpability with inadequate evidence, or other reasons that could be indicative of political motivation.

Question 7: Please provide information on the number of deportations from the United States to the United Kingdom or Ireland in the last five years (on either a calendar year or fiscal year basis).

Answer:

Removals (not including expedited removals):

	FY2001	FY2002	FY2003	FY2004	FY2005
Ireland	50	64	69	63	43
UK	329	462	430	369	325

Expedited Removals:

The following figures for expedited removals are not complete because, we understand, these figures were not being kept before 2004 and, even then, the figures are not complete even for 2004 and 2005.

	FY2004	FY2005
Ireland	4	12
UK	34	21

Question 8: Please elaborate on how Article 2(4), which permits extradition even if the laws of the requested state do not provide for punishment of such conduct committed outside its territory, is consistent with the requirement of dual criminality in Article 2(1). Additionally, please provide information on what crimes might be covered by this provision.

Answer:

Article 2(4) addresses a disparity between U.S. and UK extradition law and practice regarding extraterritorial offenses.

For the United States and most other countries, there is no requirement of equivalence of extraterritorial jurisdiction in the extradition context, and thus provisions such as Article 2(4) do not appear at all in many extradition treaties. However, the United Kingdom and some other common law countries do condition extradition not only on a finding of "dual criminality" but also, with respect to extraterritorial offenses, on a finding that the United Kingdom could also have exercised jurisdiction in similar circumstances. To accommodate this difference, Article 2(4) gives the Requested State the discretion to deny a request for extradition where it would not have had similar authority to exercise extraterritorial jurisdiction. (Israel's extradition law is similar to the United Kingdom's in this respect, and a similar provision can be found in Article III of

the 1962 U.S.-Israel extradition treaty, which is unchanged by the Protocol before the Committee.)

Thus, Article 2(4) addresses a jurisdictional issue present in the law of the United Kingdom and some other countries, whereas Article 2(1) addresses the criminal nature of the conduct itself.

Currently, Article 2(4) would potentially cover some types of crimes related to sex with children (where the U.S. statute is broader than the corresponding UK statute), and certain types of murder (where the UK statute is broader than the U.S. statute). At the time the treaty was negotiated, Article 2(4) had been relevant to an even wider group of offenses, such as some terrorism-related and counterfeiting offenses, but UK law is now more flexible in these areas.

Question 9: Ms. Warlow testified that in 2000, requests for extradition of Artt, Kirby and Brennan were withdrawn by the United Kingdom, "consistent with a general statement of policy by the United Kingdom that they were no longer seeking extradition of such defendants." Does the Executive Branch have any information from the government of the United Kingdom that the policy remains in effect? Please elaborate.

Answer:

In September 2000, the UK government announced that it would no longer pursue the extradition of individuals who, if they had remained within the Northern Ireland prison system, would now be eligible for early release. Kevin John Artt, Terence Damien Kirby, and Pol Brennan, (three individuals who were the subjects of UK extradition requests to the United States in the 1990s), all fell within that category, and the UK is no longer seeking their extradition. The Government of the United Kingdom has informed the United States Government that there has been no change in this position since 2000.

Question 10: There are several differences between the political offense exception set forth in the 1985 Supplementary Treaty and the proposed treaty. Please elaborate on the rationale for, and the significance of, each the following textual changes:

a. In Article 4(2)(c): "manslaughter" (proposed treaty) instead of "voluntary manslaughter" (1985 Supplementary Treaty);

b. In Article 4(2)(d): "any form of unlawful detention" (proposed treaty) instead of "serious unlawful detention" (1985 Supplementary Treaty);

c. In Article 4(2)(d): "an offense involving" certain acts, such as kidnaping (proposed treaty) rather than the listing of the acts (1985 Supplementary Treaty);

d. In Article 4(2)(f): "possession of an explosive, incendiary...." (proposed treaty); the 1985 Supplementary Treaty contains no analogous provision on possession.

Answer:

The words and phrases chosen in Article 4 were negotiated between the two governments to ensure that the exceptions to political offense were clearly stated in a way that would reflect modern extradition practice in the two governments and would also be consistent with other modern U.S. treaties. They reflect careful consideration by relevant U.S. Government components, including the Justice Department's Office of International Affairs, which supervises the litigation of extradition cases in U.S. courts and the manner in which various phrases in these treaties have been litigated.

a. The use of "manslaughter" in section (c) of the new treaty, as opposed to "voluntary manslaughter" in the 1985 Supplementary Treaty, reflects the language used in other of our modern extradition treaties, including those with Canada, Hungary, Luxembourg, and Poland.

b. The use of "any form of unlawful detention" in section (d) instead of "serious unlawful detention," as in the 1985 Supplementary Treaty, reflects the language used in other of our modern extradition treaties, including those with Canada, France, and Hungary.

c. The use of "an offense involving" certain acts, in section (d), is not unique to the new treaty – it is used in Article 1(d) of the 1985 Supplementary treaty. This same language is also used in other of our modern extradition treaties, including those with France, Hungary, and Poland.

d. The addition of section (f)("possession of an explosive, incendiary, or destructive device capable of endangering life, of causing grievous bodily harm or of causing substantial property damage") is designed to address the problem of an extremely narrow U.S. judicial interpretation of the more general language of the current U.K. supplementary treaty regarding explosives offenses. In the extradition case involving Pol Brennan, the United Kingdom sought the extradition of Brennan, who was arrested with a companion in downtown Belfast on the early afternoon of a business day in possession of an armed 23-pound bomb, which they intended to plant in a shop. Brennan was subsequently convicted of the offense of possession of explosives with intent to endanger life or injure property, escaped from prison, and was subsequently arrested in the United States. (*Matter of Artt*, 972 F.Supp. 1253, 1260-1262 (N.D.Cal. 1997).) In the course of the U.S. extradition case against Brennan, the Court of Appeals for the Ninth Circuit held that this offense did not constitute an "offense involving the use of a bomb" excluded from consideration as a protected political offense under Article 1(d) of the Supplementary Treaty. *Matter of Artt*, 158 F.3d 462, 471-473 (9th Cir. 1998).

The language of the new treaty makes it clear that such an explosives offense, like other serious crimes of violence, are not to be considered "political" offenses for which extradition is barred.

Question 11: Article 4(2)(f) of the proposed treaty provides that mere possession of certain items would not be covered by the political offense exception. Of course, the dual criminality provision of Article 2 would apply.

a. Is there such an offense under U.S. law? If so, please elaborate. If not, why is this provision contained in the proposed treaty?

b. Is such a provision set forth in any other extradition treaty to which the United States is a party?

Answer:

a. There are certain offenses under U.S. law that criminalize possession of explosives and other dangerous items, particularly in settings where danger to public safety is heightened. For example, it is a felony to possess an explosive in an airport (18 U.S.C. § 844(g)) or to transport a hazardous material aboard a civil aircraft (49 U.S.C. § 46312). It is also a federal felony to possess stolen explosives (18 U.S.C. § 18 U.S.C. 842(h)); to possess explosives during the commission of another federal felony (18 U.S.C. § 844(h)); to possess explosive or incendiary missiles designed to attack aircraft (18 U.S.C. § 2332g); to possess radiological dispersal devises (18 U.S.C. § 2332h); or to possess nuclear materials (18 U.S.C. § 831)). Possession of explosives or similar materials may also be an offense under the laws of individual U.S. states. See, for example, Chapter 21, Article 37, Section 3731(a) of the Kansas criminal code, which states that "[c]riminal use of explosives is the possession, manufacture or transportation of commercial explosives; chemical compounds that form explosives; incendiary or explosive material, liquid or solid; detonators; blasting caps; military explosive fuse assemblies; squibs; electric match or functional improvised fuse assemblies; or any completed explosive devices commonly known as pipe bombs or Molotov cocktails."

   As discussed in response to question #10, the addition of section (f) ("possession of an explosive, incendiary, or destructive device capable of endangering life, of causing grievous bodily harm or of causing substantial property damage") is designed to address the problem of an extremely narrow U.S. judicial interpretation, in the context of political offense, of the more general language of the current UK supplementary treaty regarding explosives offenses, where the court focused on the nomenclature of the offense rather than on the conduct.

b. This provision is not contained in any other extradition treaty of the United States. As noted above in subsection "a" of this answer, the language was negotiated in

the aftermath of a judicial decision interpreting the relevant language in the current U.S.-UK treaty.

Question 12: Article 4(2)(e) would seem to be largely covered by paragraph 2(a), by virtue of the fact that both the United States and the United Kingdom are parties to the International Convention for the Suppression of Terrorist Bombings. Are there any material differences between the two provisions? What does paragraph 2(e) add that is not covered by 2(a)?

Answer:

The changes to the wording in section (e) ("placing or using, or threatening the placement or use of, an explosive, incendiary, or destructive device or firearm capable of endangering life, causing grievous bodily harm, or of causing substantial property damage") derive from our decision to have this language track the analogous international commitment in the United Nations International Convention for the Suppression of Terrorist Bombings, an international law enforcement cooperation agreement to which both the United States and the United Kingdom are parties. Section (e) also includes unlawful use of firearms, which, of course, was beyond the scope of the U.N. Convention and, in this respect, is similar to the analogous provision in Article 1(d) of the existing treaty.

Question 13: Article VIII(1) of the current treaty governs provisional arrest. It provides, *inter alia*, that the application for provisional arrest shall contain "such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed, or the person sought been convicted, in the territory of the requested party." This language is omitted from Article 12 of the proposed treaty. Why?

Answer:

The provisional arrest language of the 1972 treaty has not been continued in this or other modern treaties because it does not provide sufficient guidance about what information should be provided at the provisional arrest stage – those urgent cases where it is appropriate to effect the immediate arrest of the fugitive – as opposed to the information that must be submitted with the formal extradition request to support a final judicial determination of extraditability.

The language of Article VIII(1) of the 1972 treaty states that the provisional arrest request should contain "an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a conviction against that person, and, if available, a description of the person sought, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed ... in the territory of the requested Party." Article VII(3) of the 1972

treaty provides that the formal extradition request, in the case of a person not yet convicted, must include information that "would justify [the fugitive's] committal for trial if the offense had been committed in the territory of the requested Party ...." From the perspective of U.S. practitioners, the antiquated language of these two provisions is not particularly helpful and would therefore not typically be included in a modern extradition treaty.

The purpose of provisional arrest is to permit, in urgent circumstances, the immediate arrest of the fugitive, pending the submission of the formal extradition documents which must be sufficient to meet all the requirements for extradition under the treaty and the domestic law of the requested country. Thus, information submitted in the context of provisional arrest is necessarily more abbreviated. The provision of the 1972 treaty gave no guidance as to what "further information," beyond the existence of a warrant and description of the fugitive, might be required and indeed suggested that no further information at all might be necessary. Article 12(2) of the new treaty makes it clear that more information is required and provides guidance as to the several categories of information U.S. courts are likely to expect in order to issue a provisional arrest warrant.

In addition, the language of Articles VII and VIII of the 1972 treaty is confusing because the distinction it clearly means to draw between the abbreviated provisional arrest request made in urgent circumstances and the fully documented formal extradition request is muddied by referencing standards of proof at two stages in a domestic criminal case – arrest and committal for trial – which are not in fact different under much of modern U.S. criminal procedure.

The new treaty resolves these difficulties by requiring more information about the offense and offender at the provisional arrest stage, and by making clear in Article 8(3)(c) that the formal extradition request must include information sufficient for the U.S. court to determine probable cause to believe the fugitive committed the offense for which extradition is sought.

Question 14: The current treaty provides for a probable cause standard for extradition. Article 2 of the 1985 Supplementary Treaty explicitly states that an individual sought for extradition may present evidence whether there is probable cause; Article IX(1) of the 1972 treaty provides that extradition shall only be granted if the evidence is sufficient "according to the law of the requested Party" to "justify the committal for trial of the person sought" if the offense had been committed in the territory of the requested party; and Article VII(3) provides that request must be accompanied by "such evidence as, according to the law of the requested Party, would justify his committal for trail if the offense had been committed in the territory of the requested Party."

The proposed treaty contains only the last provision (in Article 8(3)(c)), requiring that the request for extradition to the United States be supported by "such

information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is requested."

-- What is the standard for extradition from the United States under the proposed treaty, and upon what specific provisions of the treaty and U.S. law is that standard based?

Answer:

The standard for extradition from the United States under Article 8(3)(c) of the proposed treaty and under U.S. law is that of probable cause. Under U.S. law, the United States Constitution, together with federal case law, provides the standard used by courts to evaluate the sufficiency of foreign evidence provided in support of an extradition request. The applicable standard requires there be probable cause to believe that the person who is before the court is the person charged or convicted in the foreign country and, in those cases where the person has not been convicted, probable cause to believe that person committed the offenses for which extradition is sought. *See United States v. Wiebe,* 733 F.2d 549, 553 (8th Cir. 1984) ("The probable cause standard applicable in extradition proceedings is defined in accordance with federal law and has been described as evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt.") (internal quotation marks omitted).

Question 15: Article 16 of the proposed treaty provides for, "[t]o the extent permitted under its law," the seizure and surrender by the requested State of assets connected with the offense in respect of which extradition is granted.

a. Please summarize U.S. law on such seizure and surrender.

b. In extradition cases, at what point in time does such seizure occur?

c. Most modern U.S. extradition treaties, as well as the 1972 treaty with the United Kingdom, contain a statement that the rights of third parties shall be respected. Why is such a statement not included in Article 16 of the proposed treaty?

Answer:

In the United States, all such seizure and surrender actions would be carried out by U.S. authorities and would occur in accordance with U.S. law, including prohibitions against unreasonable searches and seizures found in the United States Constitution and in various state constitutions, and implemented in various relevant federal and state statutes.

Like in other U.S. treaty relationships, under the UK treaty in a diplomatic note requesting provisional arrest or extradition, the Requesting State would ask the Requested

State, pursuant to Article 16, to seize items connected with the offense and, if extradition is granted, to surrender those items to the Requesting State. Typically, law enforcement authorities would obtain a warrant from a judge to arrest the fugitive and, in executing the arrest warrant, will seize items and assets connected with the offense for which extradition is requested. If extradition is approved by the judge, and the Secretary of State authorizes the extradition, typically the U.S. authorities would turn over such items and assets, seized incident to arrest, pursuant to Article 16 of the treaty. If U.S. law enforcement authorities are unable to seize items incident to the arrest, they will have to obtain a seizure warrant, consistent with U.S. law, to seize those items. The seizure warrant would typically be obtained pursuant to a formal request for assistance under the Mutual Legal Assistance Treaty in place between the United States and the United Kingdom.

There is nothing novel about this provision; this same concept is contained in virtually all U.S. extradition treaties, including the existing U.S.-UK treaty currently in force between the two countries.

A statement about the rights of third parties was not necessary in this treaty given that the laws of the United States and of the United Kingdom on this topic are largely similar and provide adequately for the rights of third parties under domestic laws and procedures.

Question 16: Article 18 of the proposed treaty authorizes the requested state to waive the rule of specialty.

a. In an average year, how often does the United States or other treaty partners seek the waiver of the rule of specialty in extradition cases? How often is it granted by the United States? What is the process for reviewing and authorizing such requests in the United States?

b. In the view of the Executive Branch, what types of cases are appropriate for waiver of the rule?

Answer:

a. In practice, rule of specialty waiver provisions are infrequently invoked. From 1991 to the present, the Department of State has received approximately 30 requests for waiver of the rule of specialty. Of these, 17 were granted, 5 were denied, and 8 are pending. In the same time period, the United States has made approximately 6 requests to other countries to waive the rule of specialty.

   Generally, the criteria for evaluating a request from a treaty partner to waive the rule of specialty are (1) timeliness, (2) whether the justification for the request is sufficient, and (3) whether there is sufficient evidence to meet the probable cause

standard regarding the offense for which the request is made. If the request fails to meet any of these criteria, the request is denied.

The Department of State receives such requests in the form of a diplomatic note from the foreign government. The Office of the Legal Adviser of the Department of State does a preliminary review of the request and then forwards it to the Office of International Affairs of the Department of Justice for its review. If these offices agree that the request should be granted in whole or in part, the Office of the Legal Adviser sends that recommendation to the Secretary of State (or other appropriate principal of the Department of State) together with the relevant facts and analysis. If the Secretary (or other appropriate principal) approves the request in whole or in part, notice of that decision is communicated in a diplomatic note to the requesting government.

If, on the other hand, the Department of Justice recommends that the request be denied, the Department of State sends a diplomatic note to that effect to the requesting government.

b. The most common situation in which the Executive Branch waives the rule of specialty is when new information regarding criminal conduct surfaces that was not previously available to the Requesting State at the time the extradition was sought.

Newly discovered evidence relating to conduct of which the Requesting State was aware at the time of its request for extradition may also, in some circumstances, warrant a waiver of the rule of specialty.

Additionally, the charging of lesser included offenses and additional charges based on the same conduct may warrant a waiver of the rule of specialty. (The UK treaty, like several others, makes it clear that a waiver need not be obtained if the new charge is simply a lesser included offense.)

Question 17: Article 23(3) provides that upon entry into force of the proposed treaty, the 1972 treaty and the 1985 Supplementary Treaty shall cease to have effect, except that the prior treaty shall apply to any extradition proceedings in which the extradition documents have been submitted to the courts of the requested state. This proviso is further qualified, however, by this statement: "except that Article 18 of this Treaty shall apply to persons found extraditable under the prior Treaty."

-- Is there a temporal limitatiou to this latter provision? Iu other words, does Article 18 of the proposed treaty apply only to those extradition cases pending at the time of entry iuto force, or does it apply to all persons who have heretofore been found extraditable under the prior treaty (as that term is defined in Article 23)?

Answer:

No. Article 18 of the new treaty relating to the rule of specialty would apply to persons who have been found extraditable under the current treaty.

Question 18: Is there a relationship between this treaty and the U.S.-EU treaty on extradition? Please elaborate.

Answer:

The extradition treaty signed by the United States and the United Kingdom on March 31, 2003, would be amended in certain respects by the extradition agreement subsequently signed by the United States and the European Union on June 25, 2003. The changes to the bilateral extradition treaty resulting from the U.S.-EU agreement are identified in a bilateral instrument signed by the United States and the United Kingdom on December 16, 2004. The resulting amended text of the extradition treaty is set out in an annex to the bilateral instrument. These agreements will be presented to the Senate for its consideration when the final set of negotiations with other EU countries are completed, which we expect will be in the near future. The changes to the bilateral treaty are as follows.

Two of the changes serve to expedite extradition procedures. One will allow supplementary extradition documents to be sent directly between the U.S. Department of Justice and the UK Home Office rather than through diplomatic channels (Article 10(2) of the Annex). A second procedural improvement – simplifying certification and authentication requirements (Article 9 of the Annex) – will be implemented only after the United Kingdom enacts implementing legislation, as indicated in an exchange of notes accompanying the signing of the bilateral instrument.

The 2003 extradition treaty also would be supplemented by the addition of a provision (Article 15 of the Annex) establishing parity between a U.S. extradition request to the UK and a request to the UK for the same person made by another EU member state pursuant to the European Arrest Warrant mechanism. Finally, the U.S.-EU extradition agreement establishes a consultation procedure (Article 8 bis of the Annex) which may be employed where the state seeking extradition contemplates including particularly sensitive personal information in the request.

Since the geographic extent of the United Kingdom for purposes of EU membership is more limited than that ordinarily reflected by the United Kingdom in its international agreements with third countries, the bilateral extradition instrument implementing the U.S.-EU agreement will not apply to the Channel Islands and the Isle of Man. Those territories would continue to be subject to the 2003 extradition treaty in its original form.

Question 19: Does the proposed treaty implicate the President's power under Article II of the Constitution as Commander-in-Chief of the Army and the Navy? If so, please elaborate.

Answer:

No.

Question 20: Ms. Warlow testified that the proposed treaty eases the evidentiary burden the United States has to meet in order to seek extradition from the United Kingdom, lowering it from a standard of prima facie.

a. What is the standard for obtaining extradition in the United Kingdom under the proposed treaty and the Extradition Act 2003 (U.K.)?

b. Is it not the case that the United States is already benefiting from the lower standard by virtue of approval in the United Kingdom of the Extradition Act 2003, and the subsequent designation of the United States as a part 2 country pursuant to that Act?

Answer:

The standard for obtaining extradition in the United Kingdom is defined under UK domestic law; we understand that this evidentiary standard is comparable to the U.S. 'probable cause' standard.

One of the primary benefits of ratification of the new treaty is that the United States will be positioned to continue to receive the benefits of recent changes in UK extradition law, including the reduction in the evidentiary standard that the United States will be required to meet when seeking the extradition of a fugitive and the ability to submit hearsay evidence.

In concrete terms, what this favored status means for U.S. requests to the United Kingdom is that the United States need not produce first person affidavits (witness statements) with regard to each element of each offense for which extradition is sought. Thus, to meet the evidentiary threshold, the United States must produce only a prosecutor's affidavit that outlines the case. Of course, the United States will still have to produce the arrest warrant, charging documents, and other items as required by Article 8 of the new treaty. The United States has been benefiting, since January 1, 2004, from this lower standard by virtue of the UK's Extradition Act 2003, and the subsequent designation of the United States as a part 2 country under that Act.

We note that some defendants in extradition proceedings in the United Kingdom have argued that, under the provisions of the current treaty, the UK government could not legally designate the United States to receive the benefits of the lower evidentiary

standard. We have been advised by our counterparts in the United Kingdom that they do not believe these arguments will be successful. We also understand from our UK counterparts that U.S. non-ratification of the new treaty is now attracting considerable parliamentary interest in the UK. Various individuals and groups have suggested that the United States be removed from this favored category. (If this were to happen, the United States' extradition documents would, once again, have to meet an onerous prima facie standard.) We think it is unlikely that this idea will gain political traction, at least in the near future.